



Republic v Deputy County Commissioner Mukaa Sub County & 2 others; Kimuyu & another (Exparte Applicants); Nzioka (Interested Party) (Environment and Land Judicial Review Case E006 of 2021) [2023] KEELC 15935 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15935 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2021
TW MURIGI, J
FEBRUARY 22, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER MUKAA SUB COUNTY 1ST
RESPONDENT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

JOHN KAVOO KIMUYU EXPARTE APPLICANT

AMBROSE KINYUNGU MULWA EXPARTE APPLICANT

AND

BERNARD MAWEU NZIOKA INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 3rd August, 2021 brought pursuant to the provisions of Article 50 of the *Constitution*, Sections 7, 8 and 9 of the *Fair Administrative Action Act* 2015 and Order 53 Rule 1 (2) of the Civil Procedure Rules the *Ex-Parte* Applicants seek the following orders: -
 1. That this Honourable Court be pleased to issue an order of Certiorari quashing the judgment delivered by the 1st Respondent on 14/01/2021 and declare it unconstitutional, null and void.



2. That this Honourable Court be pleased to issue an order of prohibition directed to the Respondents and the Interested Party prohibiting them from enforcing, executing or in any manner whatsoever implementing the Judgment delivered by the 1st Respondent on 14/01/2021.
 3. Costs of and incidental to this application be provided for.
2. The application is supported by the statutory statement of facts dated 3rd August, 2021 and the verifying affidavit sworn by John Kavoo Kimuyu on his own behalf and on behalf of the 2nd Applicant on even date.

The Ex-parte Applicants' Case

3. It is the deponent's case that land parcel known as P/No. 1191 Kiongwani Adjudication Section originally belonged to his late grandfather who later donated it to his late brother Francis Musyoka Kimuyu. He averred that after the demarcation of the suit property, the late Francis Kimuyu was subjected to a Committee Case No. K10/Comm/36 of 1996 that was filed by Musau Kivuva. He stated that the case before the Committee was heard and determined on 03/12/1997 in favour of Francis Musyoka Kimuyu.
4. The Applicant further averred that the decision by Committee was not appealed against and it was assumed that the complainant and his son the Interested Party herein were contented with the decision. That on 16/10/2012, the Interested Party filed an appeal which was dismissed by the District Land Adjudication and Settlement Officer for being filed out of time. He further averred that the Interested Party was not a party to the cases and it was surprising how he became the owner of the suit property having not been substituted as a party in the adjudication proceedings through succession proceedings. The Applicants went on to state that they filed Succession Cause No. HC 2213 of 2003 and the suit property was confirmed as forming part of the Estate of Francis Musyoka Kimuyu (Deceased) vide the certificate of confirmation of grant.
5. The Applicants further averred that the Interested Party filed Objection No. 77/46 on 02/08/2006 before the Land Adjudication Officer which was dismissed with costs on 23/01/2007. That in his decision, the Land Adjudication Officer directed that the suit property be transferred to the Ex-parte Applicants who were the Administrators of the Estate of Francis Musyoka Kimuyu (Deceased) and the Interested Party to immediately vacate the suit property.
6. He further averred that the Interested Party filed an Appeal Case No. 22 of 2007 before the Minister claiming recovery of P/No. 1191 Kiongwani Adjudication Section registered in the names of the *Ex-parte* Applicants' on behalf of the Estate of Francis Musyoka Kimuyu (Deceased).
7. The Applicant averred that thereafter, they started receiving hearing notices in 2018 which they attended only for the 2nd *Ex-parte* Applicant to be denied audience. The Applicants further averred that the 2nd Applicant was denied an opportunity to be heard despite being summoned and appearing before the Minister. It is the Applicants case that the 2nd Applicant was not given an opportunity to be heard before the decision was made. That following the delivery of the decision on 14/01/2021, the Interested Party has trespassed on the suit property where he is cultivating and is also in the process of evicting the children of the late Francis Musyoka Kimuyu. The Applicants argued that it was unprocedural for the Minister to allow the Appellants appeal since he was aware that the parcel of land formed the Estate of the Late Francis Musyoka Kimuyu. The Applicants contended that proceedings before the Minister were unprocedural and went against the Wednesbury principle. The Ex-parte Applicants urged the Court to grant the orders sought.



The Interested Party's Case

8. Opposing the application, the Interested Party vide his replying affidavit sworn on 15th November, 2021 averred that the suit property originally belonged to his grandfather Kivuva whose ownership was then passed to his uncle Musau Kivuva and his father Nzioka Kivuva. He further averred that due to his uncle's old age, he participated on his behalf as a supporter or 2nd objector during the hearing of the land adjudication disputes.
9. He further averred that land parcel No. 1363 was prior to adjudication and registration, known as P/ No 1191 Kiongwani Adjudication which formed part of P/No. 1363 and belonged to his father. He averred that his family has been in occupation of parcels no 1363 and 1191 prior to their adjudication. He went on to state that historically between 1938 to 1939, the Kakumi African Court fixed the boundary between his grandfather's land and that of the Applicant's grandfather. He contended that during that time, parcel no 1353 and parcel no 1191 were one and the same thing.
10. He further averred that during the adjudication process, his father and the Applicants father together with their families held a meeting on 11/07/1995 which culminated with the parties mutually fixing their boundaries. He further averred that the Land Adjudication Officer and the Surveyors confirmed that parcel no 1191 formed part of parcel no 1363. He further averred that in 1997, his father discovered that plot no 1191 was fraudulently adjudicated to the name of Francis Musyoki Kimuyu. The Interested Party refuted the averments that there was an abuse of procedure or disregard of evidence as alleged by the Ex-parte Applicants. He urged the Court to dismiss the application with costs.

The Respondents Case

11. Opposing the application, the Respondents vide the replying affidavit sworn on their behalf by Kaburu Kaimba, the Deputy County Commissioner Mukaa Sub-County averred that the *Ex-parte* Applicants went through the dispute resolution mechanisms provided under the [Land Adjudication Act](#).
12. He further averred that it is evident from the proceedings that the Ex-parte Applicants and the Interested Party fully participated in the hearing of Objection Case No. 77/46. That the Interested Party filed Appeal Case No. 22 of 2007 against the *Ex-parte* Applicants and judgment was entered in favour of the Interested Party.
13. He contended that judicial review proceedings are concerned with the decision-making process and not the merits of the decision. He argued that the Ex-parte Applicants are challenging the merits of the case and not the decision making process. He maintains that the application should be dismissed as the Applicants have not met the threshold set out in Section 7 (2) of the [Fair Administrative Action Act](#).

The Response

14. In response, the *Ex-parte* Applicants vide a further affidavit sworn by John Kavoo Kimuyu averred that the suit property was awarded to the Interested Party without conducting a fair hearing. He averred that the suit property was awarded to the Interested Party in 2021 when there was in existence an earlier decision awarding them the suit property.
15. The application was canvassed by way of written submissions.



The Ex Parte Applicants Submissions

16. The *Ex-parte* Applicants' submissions were filed in Court on 1st July, 2022. On the issue of whether the Applicants have met the threshold for the grant of orders of Certiorari and Prohibition, Counsel argued that the *Ex-parte* Applicants must prove that due process was not complied with in the making of the decision dated 14/01/2021. Counsel submitted that due process was not followed as there are two conflicting decisions one having been issued in 2012 and the other in 2021.
17. That in the 2012 decision, all the parties were given an opportunity to be heard while in the 2021 decision, the *Ex-parte* Applicants' witnesses were not accorded an opportunity to be heard. Counsel submitted that the proceedings before the Minister were unprocedural since the *Ex-parte* Applicants were not accorded a chance to adduce evidence.
18. Counsel maintains that the Minister's decision delivered 14/1/2021 is subject to judicial review because it is not in conformity with Section 4 of the *Fair Administrative Action Act*. To buttress his submissions, Counsel relied on the following authority; *Republic v National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo* [2015] eKLR.

The Respondents' Submissions

19. The Respondents' submissions were filed in Court on 16th November, 2022. The Attorney General submitted that the appeal process being complained of by the *Ex-parte* Applicants was free from illegality, irrationality and procedural impropriety.
20. It was further submitted that the *Ex parte* Applicants and the Interested Party appeared and participated in the hearing of objection No 77/46.
21. The Attorney General further submitted that the *Ex-parte* Applicants confirmed that they were served with the hearing notices to attend the hearing before the Minister. The Attorney General went on to submit that it is evident from the proceedings and judgment in Appeal Case No. 22 of 2007 that the *Ex parte* Applicants were accorded an opportunity to participate in the appeal.
22. Lastly, it was submitted that the *Ex-parte* Applicants have not met the threshold for the grant of the judicial review orders since they are concerned with the merits of the decision of 14/01/2021 and not the decision-making process.
23. The Attorney General relied on the following authorities in support of its submissions: -
 1. Pastoli v Kabale District Local Government Canal & Others [2008] EA 300.
 2. *Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR.
 3. Union Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998
 4. *Municipal Council of Mombasa v Republic & another* [2002] eKLR

Analysis and Determination

24. Having considered the application, the affidavits and the rival submissions, I find that the only issue that arises for determination is whether the 1st Respondent decision was made in breach of the rules of natural justice.



25. In the case of *Pastoli v Kabale District Local Government Council and Others* (2008) 2 E.A 300 the duty of a Court in Judicial Review proceedings was set out as follows:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

26. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* C.A Civil Appeal No. 185 of 2001 where it held:-

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision.”

27. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* (2008) eKLR, where it was held that;

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected....”

28. The *Ex-parte* Applicants are seeking for orders to quash the 1st Respondent decision delivered on 14/01/2021 in Minister Appeal Case No. 22 of 2007 on the grounds that the decision was in breach of the rules of natural justice. The *Ex parte* Applicants are also seeking for an order to prohibit the Respondents and Interested Party from enforcing, executing or implementing the judgment delivered by the 1st Respondent on 14th of January, 2021. The *Ex parte* Applicants averred that the hearing before the Minister was unprocedural since the 2nd applicant was not accorded an opportunity of being heard before the decision was made.



29. The right to be heard is a Constitutional right enshrined in Article 47 and 50 of the Constitution and Section 4 of the Fair Administrative Act.
30. Article 47(1) and (2) of the Constitution provides as follows;
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
31. It is clear that procedural fairness is a Constitutional requirement in administrative actions. It is clear from the above provisions that the tribunal or authority entrusted with the mandate of making decisions must act in a fair manner.
32. Article 50(1) of the Constitution provides for fair trial and provides as follows:-
- Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.
33. Section 4 of the Fair Administrative Action Act, 2015 imports the rules of natural justice and provides in part as follows:-
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision: -
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 4. The administrator shall accord the person against whom administrative action is taken an opportunity to: -
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;



- c. cross-examine persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

34. The *Ex Parte* Applicants averred that the 1st Respondent's decision was unprocedural since the 2nd Applicant was not accorded an opportunity to being heard despite being summoned and appearing before the Minister. The Respondents on the hand averred that both parties were given an opportunity to participate in the proceedings before the Minister. The Interested Party on the other hand averred that both parties were accorded an opportunity to be heard in the appeal before the Minister. At this juncture, the Court is called upon to determine whether the Ex Parte Applicants were granted a fair hearing in the proceedings before the Minister.

35. *Black's Law Dictionary* 9th Edition page 789 defines a fair hearing as follows:-

“A judicial or administrative hearing conducted in accordance with due process.”

36. In *Richard Bwogo Birir v Narok County Government & 2 Others* [2014] eKLR, the court adopted the following interpretation for what entails due process: -

“Due process of law or simply, “due process” entails according the concerned person proceedings in which rules and principles for the protection and enforcement of private rights are upheld by the decision maker or relevant authority. At the core of due process is according the concerned person a reasonable notice with sufficient particulars to prepare for a fair hearing, the second crucial element of due process (see definition and explanation in *Black's Law Dictionary*, 9th Edition). Thus the court holds that due process will not be said to exist in absence of a reasonable notice with sufficient particulars to prepare for a fair hearing.”

37. It is a cardinal rule of natural justice that no one should be condemned unheard. In *Onyango Oloo v Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows;

“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and



able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

38. The Ex parte Applicants and the Interested Party gave an elaborate background of the appeal before the Minister. The Applicant averred that the late Musau Kivuva filed Committee Case No. K10/COMM/36 of 1990 against the late Francis Musyoka Kimuyu which was heard and determined on 03/12/1997 in favour of Francis Musyoka Kimuyu. According to the proceedings and findings of the Committee, the land was awarded to the Defendant.
39. The Interested Party appealed against the decision to the Land Adjudication Officer. In Objection Case No 77/76 the Interested Party was the 1st Objector while the 1st Ex parte Applicant was the 2nd objector. The Land Adjudication Officer in his decision upheld the judgment of the Committee Court and dismissed the appeal.
40. According to the evidence presented by the parties herein, it is apparent that the appeal before the Minister emanated from the decision of the Land Adjudication Officer in Objection Case No. 77/46.
41. I have perused the proceedings and findings in Minister's Appeal Case No. 22 of 2017 conducted before the District Commissioner Mukaa Sub County. In the appeal before the Minister, the *Ex parte* Applicants were the Respondents while the Interested Party was the Appellant therein. From the proceedings, the Appellants witnesses are listed as Josphat Wambua, Kyalo Nzioka, Kamuyu and Mathew Mulandi while the Respondents had no witness. The Appellant (the Interested Party herein), his witnesses and the 1st Respondent (the 1st *Ex parte* Applicant herein) were recorded as having been sworn and gave evidence. It is evident that they participated in the proceedings by giving evidence, cross examination and calling witnesses.
42. The 1st Applicant gave his testimony and was allowed to cross-examine the Appellants witnesses. He fully participated in the proceedings before the Minister. The Deputy County Commissioner who was hearing the appeal took the evidence of the parties and the witnesses who were present during the hearing date. In its decision the Minister allowed the appeal and ordered that the land be registered in the name of Benard Maweu Nzioka.
43. The Applicant averred that the 2nd applicant was not afforded an opportunity of being heard despite being summoned and appearing for the hearing before the Minister. In this regard the Applicants annexed hearing notices (annexure "JKK9b") to their verifying affidavit. It is crystal clear that the *Ex parte* Applicants were invited for the hearing of the Appeal Case No. 22 of 2007 before the Minister. The *Ex parte* Applicants did not bring witnesses to the Minister's Appeal despite summons having been served.



44. According to the certified proceedings and the signed decision of the Minister dated 14/01/2021, it is apparent that the 1st *Ex-parte* Applicant honoured the summons and gave evidence in respect of the disputed suit property. It is also apparent that the 2nd Applicant did not attend the hearing. The *Ex parte* Applicants cannot turn around and allege that the 2nd Applicant was not given an opportunity to being heard when he failed to avail himself for the hearing. Moreover, the Applicants did not demonstrate that there was an earlier decision before the Minister delivered in 2012.
45. This Court finds absolutely no evidence of bias or unfair treatment. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the 1st Respondent was biased or unfair towards the Applicants.
46. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court is satisfied that the 2nd Applicant was afforded an opportunity to participate in the said proceedings through the issuance of hearing notices. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.
47. In the case of *Municipal Council of Mombasa v Republic & Umoja Consultant Limited* [2002] eKLR the Court held that:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at” Did those who made the decision have the power, i.e. the jurisdiction to make it” Were the persons affected by the decision heard before it was made” In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters” These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

48. Similarly, in *Republic v Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama* [2018] eKLR it was held, *inter alia*, that:

“The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in *Republic v. Kenya Revenue Authority Ex parte Yaya Towers Limited*, (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.”

49. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicants are in reality aggrieved by the merits of the decision of the 1st Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. They were aggrieved because the 1st Respondent overturned the earlier decisions which was in their favour. The Court is of the opinion that the Applicants are challenging the merits of the Minister’s decision in the appeal.



50. In my opinion, I find that a judicial review remedy would not be available in these circumstances. The upshot of the foregoing is that the Court does not find merit in the Application for judicial review.
51. Accordingly, the Notice of Motion dated 3rd of August 2021 December, 2019 is dismissed with costs to the Respondents.

HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2023.

In The Presence Of: -

Court Assistant - Mr. Kwemboi

Kiluva holding brief for Makundi for the Applicants.

Mr. Were holding brief for Musungu Pekke for the Interested Party.

